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THE HAWAIIAN GAZETTE.

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Supreme Court of the Hawaiian Islands—In Banco.

BEFORE ALLEN, C.J., HARTWELL AND WIDEMANN, J.J.

Frank H. Harris, Assignee of Owen Jones Holt, vs. A. F. Judd, Administrator with the Will annexed of the Estate of Robert W. Holt, deceased.

AGREED STATEMENT.

"The undersigned respectfully represent unto your Honorable Court, that Owen Jones Holt, being indebted to various persons in very considerable sums of money which he is unable to pay, did on the 10th day of July, A. D. 1871, make an assignment to the undersigned F. H. Harris, a copy of the Deed of Assignment being hereunto annexed, marked 'Exhibit A,' and made a part hereof.

And the undersigned further represent that the said F. H. Harris did proceed to sell certain personal property belonging to the said Owen Jones Holt, the proceeds of which were insufficient to pay the debts of the said Owen Jones Holt, but that a large sum remains due and owing.

And the undersigned further represent that Robert W. Holt, father of the said Owen Jones Holt, made and executed as for his last Will and Testament a certain writing, a copy of which said writing is hereunto annexed, marked 'Exhibit B,' and made a part hereof.

That the said Robert W. Holt, subsequently to the execution of the said last Will and Testament, deceased, and that the document herein above last referred to, was duly admitted to Probate on the 29th day of July, A. D. 1862, as and for the last Will and Testament of the said Robert W. Holt.

And the undersigned further represent that there is the hands of A. F. Judd, Administrator as aforesaid, one of the parties to this submission, the sum of ($60,000) Sixty Thousand Dollars, or thereabouts, in cash, as principal, belonging to the estate of the aforesaid Robert W. Holt, deceased.

And the undersigned F. H. Harris, claims that the proportionate share of the income or interest derived from the said money, which is directed by the said Will of the said Robert W. Holt to be paid to the said Owen Jones Holt, should be paid to the said F. H. Harris, Assignee as aforesaid. But the undersigned A. F. Judd, Administrator as aforesaid, on the contrary, claims that the one quarter of the interest of the said sum of Sixty Thousand Dollars should be paid to the said Owen Jones Holt, and to him alone, and that the said one quarter interest is not assignable or liable for the debts of the said Owen Jones Holt.

And further, the undersigned represent that there is a large amount of real estate belonging to the Estate of the aforesaid Robert W. Holt; and the undersigned F. H. Harris, Assignee as aforesaid, claims that he has the right of possession of and to one quarter of the real estate in said Will devised, for and during the natural life of the said Owen Jones Holt, and the right of disposing of the said life interest for the purpose of paying the debts of the said Owen Jones Holt; and that the said quarter of the said real estate should be separated and set apart from the rest of the estate devised by the said Robert W. Holt, so that he may have the opportunity of disposing of the same for the purpose aforesaid. But on the contrary, A. F. Judd, Administrator as aforesaid, claims that he is entitled to the possession of the real estate herein above referred to, and may assign the same for the residence of the said Owen Jones Holt, or may rent the same and pay the rent that may be received to Owen Jones Holt himself and to no one else, and that the same is not liable for the debts of the said Owen Jones Holt.

And the undersigned A. F. Judd, Administrator as aforesaid, avers that on the 22d day of November, A. D. 1862, an indenture was entered into between W. A. Aldrich, Executor of the last Will and Testament of the said Robert W. Holt, deceased, and James R. Holt and Owen Jones Holt, a copy of which is hereunto annexed, marked 'Exhibit C,' and made a part hereof; and the undersigned Frank H. Harris, Assignee as aforesaid, admits the said document to have been made, signed and delivered as therein set forth; and the said A. F. Judd claims that the said document constituted the only right of possession of the said James R. Holt and Owen J. Holt, his brother, to the lands set forth in the said document; and it is agreed by both parties to this submission that James R. Holt has sold and conveyed all his right, title and interest in the lands set forth in the said document to the said Owen Jones Holt. But on the contrary, Frank H. Harris, Assignee as aforesaid, claims that the said agreement in no way changed the title of the said Owen Jones Holt in and to his proportion of the lands devised by the Will of the said Robert W. Holt, his father.

And the undersigned A. F. Judd, Administrator as aforesaid, avers that the Will of the said Robert W. Holt, deceased, created the Executor of the said Will and his successors in the said trust, a Trustee, to hold the said real and personal estate thereby devised and bequeathed, and to pay over one quarter of the net rents, issues and profits of the said estate to the said Owen Jones Holt, for and during the term of his natural life, for his use and support, with remainder to the heirs of the said Owen Jones Holt and their assigns, and that the said life interest and estate of the said Owen Jones Holt is not alienable or assignable, and that the same is not liable for the debts of the said Owen Jones Holt, and that the said interest of the said Owen Jones Holt is an estate in common with the other devisees and can not be severed. But on the contrary, Frank H. Harris, Assignee as aforesaid, avers that the said interest and estate of the said Owen Jones Holt is alienable and assignable, and liable for the debts of the said Owen Jones Holt, and that the estate of the said Owen Jones Holt, in the premises, can and should be severed; and that the said Owen Jones Holt can and ought to hold his share of the said estate in severalty during his life, and so likewise his assigns, or persons holding under him by authority of law or otherwise.

"Dated at Honolulu this 7th day of October, A. D. 1872.

(Signed) F. H. HARRIS,
Assignee of Owen Jones Holt.
(Signed) A. F. JUDD,
Administrator with the Will annexed of the Estate of Robt. W. Holt, deceased."

[EXHIBIT A, is an ordinary Deed of Assignment, with Power of Attorney.]

EXHIBIT B.

First: I give, devise and bequeath to my wife, Wati Holt, for the term of her natural life the sum of Eight Hundred Dollars, to be paid to her yearly in quarterly payments of Two Hundred Dollars, by my Executor hereinafter named, for her maintenance and support.

Third: I give, devise and bequeath to my son, Owen Jones Holt, one quarter of all my estate, both real and personal, the income of the same to be paid to him by my Executor hereinafter named, for his use and support for the term of his natural life, and after the death of my said son, I give, devise and bequeath the said one quarter to the heirs of the said Owen Jones Holt and their assigns.

[Clauses 2 and 4 providing for the other sons same as for O. J. Holt.]

Fifth: I give, devise and bequeath to my daughter, Elizabeth M. Aldrich, wife of W. A. Aldrich, one quarter of all my estate, both real and personal, and to her heirs and assigns.

Sixth: I ordain and appoint William A. Aldrich Executor of this my last Will and Testament.

[EXHIBIT C, Indenture of Lease referred to in the opinions of the Court.]

C. C. Harris, for the Assignee.

A. F. Judd and S. H. Phillips, for the Administrator.

OPINION OF CHIEF JUSTICE ALLEN, DISSENTING FROM THE JUDGMENT OF A MAJORITY OF THE COURT.

This is a case of submission under the Statute, by F. H. Harris, Assignee of Owen Jones Holt, and A. F. Judd, Administrator with the will annexed of the estate of Robert W. Holt, deceased.

It appears by the submission, that Owen Jones Holt made an assignment of all his property, for the benefit of his creditors, to F. H. Harris, and by force of which he claims all the interest in the estate which was bequeathed to him by Robert W. Holt, by his will.

On the contrary, it is claimed by the Administrator that, by the will, he is created a trustee to hold said real and personal estate thereby devised and bequeathed, and to pay over one-fourth of the net rents, issues and profits of the said estate to said Owen Jones Holt during his life, for his use and support, with remainder to the heirs of said Owen Jones Holt and their assigns, and that said life interest is not alienable or assignable, and not liable for his debts.

By the will a bequest is made by the testator for the term of the natural life of his wife of the sum of $800, to be paid to her yearly in quarterly payments of $200, by the executor. And a bequest is made to Owen Jones Holt of one quarter of the estate of the testator, both real and personal, the income of the same to be paid to him by the executor for his use and support for the term of his natural life, and after his death there is an express bequest of the said one-fourth part of the estate to his heirs and their assigns.

Jarman says: "There is no principle of law more generally admitted than that the intention of the testator should be carried out. No degree of technical informality or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words, or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of the author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together."—Smith vs. Bell, 6 Peters, 198; Hona vs. Skelton, 2 Met., 194; Morton vs. Bennett, 22 Maine, 257.

Buller, Justice, in the case of Hodgson vs. Ambrose, 1 Douglas, 342, says: "If the intention is apparent, I know of no case that says that a strict legal construction, or a technical sense of any word whatever, shall prevail against it."

It is very evident that the first obligation of the executor imposed by the will, is to pay the testator's wife $800 per annum during her life, in quarterly payments, and the whole property is held by him in trust for that purpose.

2d. It is made the duty of the executor to pay to Owen Jones Holt, a son of the testator, the income of one-quarter part of this estate demised *for his use and support* during his life, and a bequest over to the heirs of said Holt.

The instrument might have been more explicit in declaring the duties of the executor, but they are clearly implied. It is very clearly his duty, therefore, to take charge of the estate and manage and improve it, and collect the rents on the real estate, and the income from the personal property, interest on notes and mortgages, &c., &c.

In the celebrated case of Leggett *et al.* vs. Perkins, (New York Rep., 2 vol. 297,) testator gave two-fifths of his real estate to his two daughters, so that each might have and enjoy the income of one-fifth during their lives, and on their death their shares to go to their issue. He appointed executors and constituted them trustees, and authorized and desired them to manage and improve the estate, and to pay to his daughters from time to time the income.

The Court held that the will vested the legal estate in the trustees during the lives of the daughters; and, 2d, that the trust was valid.

The testator provided further that the net income should be paid to the daughters, after marriage, without the consent of their husbands. The Court say, "that if the husband took an estate by the curtesy, as he would if the fee vested in the daughter, he would be entitled to the rents and profits, and the separate provision for the daughter would be totally ineffectual."

No particular form of expression is requisite in order to create a binding and valid trust, but it is requisite that the testator should have pointed out with sufficient clearness and certainty both the subject matter and the object of the trust. (1 Redfield, 700.) The subject is the income of the property held by the executor, and the object the payment of the same for the use and support of his son, both are clearly set forth in the will.

Jarman says, (vol. 1, 332,) "Technical language, of course, is not necessary to create a trust. It is enough that the intention is apparent." By the common law the trustee must apply the trust fund according to the instruction of its author. There has been great conflict of opinion on the question of trusts, and Redfield says, (1 vol. 702,) "that no one feels any confidence in relying upon any decision in regard to trusts, unless it has been very recently made, or else many times recognized in the later decisions of the Courts." What was the intention of the father when he vested the title of the property in the executor as a trustee, and directed him to pay the income for the use and support of his son? Was it not clearly his intention that the estate should remain intact, and that payment should be made from time to time to the son, as may be necessary for his support. In the case of Leggett vs. Perkins, the Court say, "It is said that if a person is competent to take care of the money when paid over, there is no reason why the estate should not be transferred to him, out of which it is raised. But to be influenced by this suggestion, we must not shut our eyes to the light of history and experience. Every one knows that there are individuals in every society who are neither imbecile nor profligate, nor united with those who are so, who could properly dispose of a fixed income, and yet who ought not, from prudential reasons, to control the capital out of which it is raised." This reasoning applies with peculiar force to our own people. They are generous, and hospitable, and liable to be misled by the designing and unprincipled. The young are often enticed into idle and dissipated habits, and become entirely reckless of consequences either to health or property. To guard against those evils and propensities, the father undoubtedly imposed the restrictions contained in the *will*, which exhibited a wise foresight as well as a parental regard for the happiness and independence of his son. If, in this case, the beneficiary has the legal right to assign the income during his life, he virtually disposes of his interest in the property, and thereby defeats the intention of his father.

In the case referred to above, and also in the case of Gott vs. Cook, (7 Paige, 538,) "great discussion has arisen as to the force of the terms used in trust deeds, and especially on the distinction in legal effect, between the words to pay over the income to a beneficiary or to apply it to his use."

The statute, as originally framed and passed, authorized a trustee to receive the rents and profits of lands, and apply them to the education and support of the beneficiary, or either of them. This was regarded as too limited in its application, and the word use was substituted, as the revisers of the law said that the word use includes education and support, and also other purposes which ought to be provided for.

The Chancellor says, "that the great object of the Statute is attained, if the property by means of the trust is placed beyond the reach of those who might squander the rents and profits in anticipation, or might allow the property to be taken for previous debts."

Judge Bronson, in his dissenting opinion in this case, says, "that the Statute authorizes a trust to receive the rents and profits of land and apply them to the use of any person, but whether under this provision a valid trust can be created to receive rents and profits to pay them over to the beneficiary is a question which has undergone a good deal of discussion in the books.

"There is, in my judgment, a very plain and substantial difference between the Statute trust, to receive rents and profits and apply them to the use of another, and such a trust as the testator has made, to receive rents and profits and pay them over as a debt due to another. In the one case the trustee has a discretion in the application of the money, in the other he has none.

"If the trust had been created in the words of the Statute to receive and apply rents and profits, or in any other equivalent words, no one can doubt that the trustee would have had the right to control the expenditure of the money.

"When the trust is to receive and apply rents and profits, I have never met with any judge or lawyer who denied that the trustee had authority to make the application of the trust money."

By the language used in the will, when the income is to be paid over for use and support, a discretionary power is vested in the trustee. It is not a payment only, but a payment for the use and support of the beneficiary. A Court of Chancery will always protect a trustee who acts in good faith and refuses to place the income in the hands of the beneficiary, to be wasted in dissipation or otherwise.

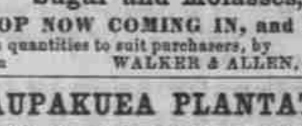
When the father gave to the trustee authority to apply the income to the use and support of his son, was it not for the very purpose of preventing the possibility of his squandering it? Had it been a life estate, without limitation, over which the beneficiary had the entire control, no such language would have been used.

I am of opinion that a valid trust is created, and that the trustee is empowered to receive the rents and profits and apply them to the use of the beneficiary, after they have been received him.

In the case of Ames vs. Clark, (106 Mass., 573,) the language of the will is that Hannah B. Mason gave to William Clark, her brother, $600 annually, for his life, to be paid by the executors in equal quarterly payments, with the further provision that no part of the bequest should, while remaining in the hands of the executors, be liable for any of the debts of said Clark. The Court regarded the annuity as a vested right which was assignable.

This case differs materially from the case at bar, in not imposing a duty of applying the money to the use and support of the devisee, but merely to pay it over. In the one case the payment is

[*Concluded on the fourth page.*]



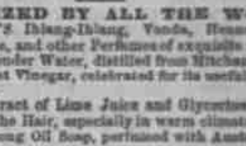
Boundary Commissioner's Notice.

PROPER APPLICATION HAVING BEEN MADE to the undersigned that the Boundaries of the following Lands, situated in the District of North Kohala, Island of Hawaii, H. I., may be defined and settled, viz: Pololu, Kaauhuhu, Kehena 2d, Nunuulu 1st and 2d, Kaiholena 1st and 2d. Notice is hereby given to all whom it may concern that WEDNESDAY, the 9th day of April next, A.D. 1873, at 10 o'clock A. M., is the day and hour set apart for the hearing of said applications, at the Court House in North Kohala, Hawaii. R. A. LYMAN,
Commissioner of Boundaries, 3d Jud'l Circ't.
Hilo, Feb. 26, 1873. 8-3t.

ADMINISTRATOR'S NOTICE.

The undersigned having been appointed Administrators of the Estate of the late APO (Chinese), of Hilo, Island of Hawaii, hereby notify all persons indebted to the said estate to make immediate payment; and all persons having claims against said estate are hereby notified to present the same.
KAHUE (w),
L. SEVERENCE,
Temporary Administrators.
Sheriff's Office, Hilo, February 4, 1873. 6-tf

Space Measured in Nonpareil Type.	1 w.	1 m.	3 m.	3 m.	6 m.	12 m.
6 Lines—½ inch	$1 00	$2 00	$3 00	$4 00	$6 00	[illegible]
12 Lines—1 inch	1 50	3 00	4 00	5 00	8 00	[illegible]
24 Lines—2 inches	2 00	4 00	6 00	7 50	10 00	[illegible]
36 Lines—3 inches	3 00	5 00	7 50	10 00	14 00	[illegible]
48 Lines—4 inches	4 00	6 00	10 00	12 00	18 00	[illegible]
Quarter of Column	6 00	10 00	14 00	18 00	[illegible]	[illegible]
Third of Column	8 00	12 00	18 00	22 00	[illegible]	[illegible]
Half of Column	12 00	18 00	24 00	30 00	45 00	75 00
One Column	18 00	30 00	45 00	75 00	100 00	150 00



Boundary Commissioner's Notice.

PROPER APPLICATION HAVING BEEN MADE to the undersigned, that the Boundaries of the following Lands, situated in the District of Hamakua, Island of Hawaii, may be defined and settled, viz: Waialeale 2d, Waikaloa 1st, Honokaia; Notice is hereby given to all whom it may concern, that WEDNESDAY, the 16th day of April next, A.D. 1873, at 10 o'clock A.M., is the day and hour set apart for the hearing of said applications, at the Court House in Waimea, South Kohala, Hawaii.
R. A. LYMAN,
Commissioner of Boundaries, 3d Jud'l Circ't.
Hilo, Feb. 26, 1873. 8-3t

Marshal's Sale.

BY VIRTUE OF A WRIT OF EXECUTION issued out of the Supreme Court of Law and Equity of the Hawaiian Islands, upon a judgment against LAPAELA, Defendant in Execution, in favor of CATHARINE STEWART, Plaintiff in Execution, for $219.75. I have levied upon and shall expose for sale to the highest bidder on SATURDAY, the 29th day of March, at 12 o'clock noon, on the premises, all the right title and interest of the said defendant in and to the following described property, viz:

"Apana 1." Containing 2 Kalo Patches situated in Kapalama, Honolulu, and containing 1 18-100 acres, as described in Royal Patent, No. 664.

"Apana 2." Fish Pond and Kalo Patch, also situated in Kapalama, Honolulu, and containing 1 32-100 acres, and described in Royal Patent, No. 664, together with all the buildings and appurtenances thereon situated.

The said land will be sold subject to a mortgage and interest of $161.96 in favor of S. B. Dole, Esq. Unless said judgment interest costs of sale and my fees and commissions be previously satisfied.
W. C. PARKE, Marshal.
Honolulu, March 7, 1873. 8-4t